Chapter 2: Trusts and Estates

Emil Slizewski
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Trusts and Estates

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§2.1. Wills: Alteration and effect thereof. An alteration of any material part of a will made after execution is ineffective unless it is made with the formalities required for the execution of a valid will. Although it has been stated that Massachusetts law does not raise a presumption as to the time of will changes, the proponent has the burden of proving that they occurred before the instrument was executed.

In Flynn v. Barrington the Supreme Judicial Court from an examination of the document alone concluded that a will was altered at some time. The dispositive provisions were handwritten on a stationer’s form. In its altered form a legacy of $160,000 was given to testator’s wife. It appeared that a five-digit sum at least was given to the wife and that the figures “0 000” were present at all times, hence the original legacy could not have been less than $10,000. The Court remanded the case to the Probate Court for further hearing and if the proponents then failed “to establish that the alteration occurred prior to execution of the will or the actual amount of the original gift before the alteration, the record at the new hearing may be such as to make it appropriate to admit the unaltered document to probate, treating the gift to the widow as having been in the minimum amount of $10,000.”

The proffered solution in the event of lack of proof of the time of alteration and of the amount of the wife’s original legacy in no way subverts the policy of the wills act. The unaltered bequest appeared in a writing properly attested, and even after the change it appeared certain that at least $10,000 was given. The exact amount may have been substantially greater, but to require that the gift completely fail if there be no proof of that sum would fully defeat the testator’s wishes to make a pecuniary legacy in favor of his wife.

EMIL SLIZEWSKI is Professor of Law at Boston College Law School and a member of the Massachusetts Bar.

4 342 Mass. at 194, 172 N.E.2d at 596.
§2.2. Wills: Pour-over: Independent significance. In estate planning it is often desirable to have separate transfers of property integrated by merging control of administration in a single trust with a comprehensive dispositive scheme. A popular device is to bequeath property to the trustee of a living trust. This is commonly known as a “pour-over” arrangement. There are two theories upon which a pour-over from a will to an inter vivos trust may be given effect — the doctrine of incorporation by reference and the doctrine of independent significance.

The doctrine of incorporation by reference will permit the will to dispose of property according to the terms of an inter vivos trust instrument if (1) the instrument is in existence at the date of execution of the will, (2) the will describes the instrument with reasonable certainty, (3) the instrument is described as being in existence when the will is executed, (4) the intent of the testator to incorporate the writing appears in the will.1

The utilization of this theory to effectuate the pour-over of a residue into an inter vivos trust presents distinct disadvantages. With the trust writing incorporated into the will, the trustee will become subject to probate control in the administration of the assets received by will. If the trust is an amendable one, the pour-over will be effective only with regard to the trust instrument as it read at the time the will was executed, and subsequent amendments will be disregarded insofar as the addition of the probate assets is involved.2 It became familiar practice for the Massachusetts lawyer, who relied on the theory of incorporation, to execute a codicil to the will incorporating each new amendment to the trust. This practice is obviously inconvenient and subject to risk.

The more practical way to realize a pour-over into a living trust would be to rely upon the so-called doctrine of independent significance.3 This theory permits resort to unattested acts and facts that have a significance apart from the testamentary disposition in determining who is to take what property under the will. A valid inter vivos trust created by the testator, who pours the residue of his estate into such trust, has an independent significance even though it be revocable and amendable.4 The Restatement of Trusts, Second, §54, Comment i, recognizes this theory as effectuating a pour-over into an amendable trust in the following language:

3 See Restatement of Trusts, Second, §54, Comment i; 1 Scott, Trusts §54.3 (2d ed. 1956); Shattuck and Farr, An Estate Planner's Handbook §16 (2d ed. 1953); McClanahan, Bequests to an Existing Trust, 47 Calif. L. Rev. 267 (1959); Palmer, Testamentary Disposition to the Trustee of an Inter Vivos Trust, 50 Mich. L. Rev. 33 (1951); Evans, Non-testamentary Acts and Incorporation by Reference, 16 U. of Chi. L. Rev. 695 (1949).
Where the inter vivos trust is created by an instrument in which the settlor has reserved power by subsequent instruments to modify the trust, and in his will he leaves property to be added to the trust, and thereafter he executes an instrument modifying the trust, the disposition made by the will is valid.

If in his will the testator manifested an intention that the property bequeathed should be held upon the terms of the trust as they were at the time of the execution of the will, the disposition may be upheld upon the ground that he has incorporated by reference the existing trust instrument. It may also be upheld upon the ground that the trust as it was at the time of the execution of the will was a fact of independent significance.

If in his will the testator manifested an intention that the property bequeathed should be held upon the terms of the trust as they should be at the time of his death, the disposition is valid on the ground of resorting to a fact of independent significance. It cannot be supported on the ground of incorporation by reference, since the instrument which was to govern the testamentary disposition, namely the instrument of modification, was not in existence at the time of the execution of the will. On the other hand, it can be upheld on the ground of resorting to a fact of independent significance, since the inter vivos trust, as it exists at the time of the settlor's death, is such a fact. It is immaterial that the trust was modified after the execution of the will; it is sufficient that it exists independently of the testamentary disposition at the time of the testator's death.

The question of how far a pour-over from a will to an amendable inter vivos trust established by the testator is valid and enforceable had not received a full discussion by the Massachusetts Supreme Judicial Court before the 1961 SURVEY year. Old Colony Trust Co. v. Cleveland was a case containing dictum to the effect that a pour-over would be valid only if the requirements for an incorporation by reference were met. After the Court found that a will gave the residue to the trustee of an amendable trust in its unamended form, the Court volunteered the information that the testator could not pass property to the trust as amended if the amendment were made after execution of the will.6

This dictum was rejected and the doctrine of independent significance was fully accepted and applied in Second Bank-State Street Trust Co. v. Pinion.7 There, a husband and wife established a revocable and amendable inter vivos trust which provided for amendment by a

6 "Obviously the will did not, and could not, give the residue in trust for purposes which had not then been defined, but remained to be defined by a later amendment of the trust deed. A document not in existence cannot be covered by the attestation of the will. . . . Even though the testator so expected, the residue passing by the will cannot simply be added to the trust fund established during the life of [the testator], and be made to follow the course of that fund to its ultimate destination under the amended trust deed." 291 Mass. at 380, 196 N.E. at 921.
written instrument signed and acknowledged by the settlors and the
two trustees, one of whom was the husband. Later, they executed
separate wills which bequeathed the residue of their estates to the
previously created trust "as amended." Both wills provided that the
residuary estates paid to the trustees were "to be held, administered,
and distributed solely under the provisions of such indenture, and in
no way as trustee under this will nor as a trustee subject to appoint­
ment by or jurisdiction of any probate or other court." After the
execution of these wills, the husband and wife, as settlors, and the
husband, as one of the trustees, executed an instrument amending
the dispositive provisions of the trust. On this same day they executed
codicils to their wills to name a co-executor and to ratify and confirm
the will in all other respects. Four days after execution of the codicils
the amendment to the trust became effective when it was acknowledged
by the second trustee. After the deaths of the husband and wife, the
executor sought instructions as to the mode of disposition of both
residuary estates.

The Supreme Judicial Court ruled that each will made effective
residual gifts to trustees to hold under the trust as amended. The
doctrine of incorporation by reference was deemed inapplicable be­
cause the wills expressly negatived any intent to incorporate the trust
into the wills — the residuary clauses provided that the trustees were
not to be subject to the control of the probate court and that the trust
funds were to be administered and distributed solely under the terms
of the trust indenture. Furthermore, the instrument of amendment
did not become effective until after the second trustee acknowledged
it, and this did not happen until after the codicils were executed.

In concluding that the pour-over into the trust as an entity was valid,
the Court noted that this was the logical extension of several previously
decided Massachusetts cases which permitted testamentary dispositions
to be controlled by acts of non-testamentary significance.8

Apart from legislation,9 the Pinion case is the first in any jurisdiction
expressly deciding that a will may pass the residue to an amended trust
when the amendment was with respect to a dispositive provision and
when it was made after the execution of the will.10

8 A bequest to persons in the employ of the testator at his death: Anderson v.
Stone, 281 Mass. 458, 183 N.E. 841 (1933); Murphy v. Lawrence, 218 Mass. 39, 105
N.E. 380 (1914); Frazer v. Weld, 177 Mass. 513, 59 N.E. 118 (1901); White v. Massa­
chusetts Institute of Technology, 171 Mass. 84, 87, 50 N.E. 512, 514 (1898). A bequest
of contents of a safe: Old Colony Trust Co. v. Hale, 302 Mass. 68, 71, 18 N.E. 432,
434 (1938); Gaff v. Cornwallis, 219 Mass. 226, 106 N.E. 860 (1914). The contents of
books of account controlled the amount of a bequest even though the books were not
in existence when the will was made: Holmes v. Coates, 159 Mass. 226, 228-229, 34
9 See statutes cited by the Court, 341 Mass. 366, 371 n.l, 170 N.E.2d 350, 353 n.1
(1960).
10 See In re Estate of York, 95 N.H. 435, 65 A.2d 282 (1949) (no subsequent amend­
ment and doctrine of independent significance applied); Swetland v. Swetland, 102
N.J. Eq. 294, 140 Atl. 279 (1928) (no subsequent amendment and gift to trustee
treated as a gift to an entity); In re Ivie’s Will, 155 N.Y.S.2d 544 (Surr. Ct. 1956)
(amendment as to administrative provision after execution of will).

http://lawdigitalcommons.bc.edu/asml/vol1961/iss1/5
§2.3. Wills: Apportionment of estate tax. If a decedent fails to specify where the burden of the federal estate tax will fall, the state tax apportionment law controls. A Massachusetts statute\(^1\) imposes upon a nonprobate item which is included in the gross estate that portion of the estate tax that is attributable to such item. Property subject to a general power of appointment will bear its share of the tax, "except as otherwise provided or directed by the trust instrument . . . or by the decedent's will." \(^2\)

*Whitbeck v. Aldrich*\(^3\) decided that the effect of a tax clause in testatrix' will was to impose upon her probate estate all death taxes on items in her gross estate including property subject to a power of appointment, leaving insufficient funds to satisfy the bequests under her will. Her will exercised a general power of appointment, made provision for a specific devise, two pecuniary legacies in the approximate amount of $23,000, and left the balance of the estate in trust for an invalid sister. The tax clause read:

> All estate, inheritance, legacy, succession or transfer taxes . . . imposed by any domestic or foreign laws now or hereafter in force with respect to all property taxable under such laws by reason of my death whether or not such property passes under this will and whether such taxes be payable by my estate or by any recipient of any such property, shall be paid by my executor out of my general estate . . . with no right of reimbursement from any recipient of any such property.

The federal estate tax on the gross estate approximated $40,000, but so much of the tax that was attributable to the decedent's individually owned estate exclusive of the subject matter of the power amounted to less than $200.

The Court thought that the will expressly and clearly provided for a tax apportionment other than that provided for by statute even though the payment of the larger tax out of the estate of the testatrix left insufficient funds to pay the two pecuniary legacies in full and no funds for the trust for the benefit of the invalid sister. In answer to the contention that the decedent could not have intended such a result, the Court stated that there was no ambiguity in the will and that it was not to guess the intention of the testatrix from what would seem to be a more equitable testamentary scheme. It is possible that she would have specifically desired the result which has happened.

The case is distinguishable from *Malden Trust Co. v. Bickford*,\(^4\) where a will provided:

> I direct that all taxes of every kind upon the whole or any part of my estate, including inheritance, estate and transfer taxes, both

\(^1\) G.L., c. 65A, §5.

\(^2\) Id. §5(2).


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state and federal, shall be paid from the residue of my estate, it
being my desire that the legatees and devisee herein shall receive
the full amount of their legacies and devise without the deduction
of any tax.

It was held that the words "my estate" meant probate estate and that
joint accounts and bank shares in the gross estate bore a proportionate
burden of the federal estate tax. It was recognized that the words "my
estate" could have been construed to mean taxable estate but for the
qualifying words, "it being my desire that the legatees and devisee
herein shall receive the full amount of their legacies and devise with­
out the deduction of any tax." The tax clause in the Whitbeck case
refers to "all property taxable under such laws by reason of my death
whether or not such property passes under this will," which language
appears to preclude an interpretation that decedent had in mind her
probate estate only.

§2.4. Wills: Conservator's waiver approved after death of ward.
By statute the guardian or conservator of a surviving spouse may with
the approval of the Probate Court exercise the ward's right to waive
the will and claim a statutory forced share. Although the waiver must
be filed within six months of the date of allowance of the will, the
approval of the court does not have to be given within that time.

It was decided in Old Colony Trust Co. v. Coffman that the Probate
Court had jurisdiction to approve a conservator's waiver filed within
six months of the probate of the decedent spouse's will despite the
ward's death before the approval. On waiver the ward obtained a
vested interest which passed to his personal representative upon his
death. The statute requiring approval of the waiver was not designed
to affect that interest but was intended to forestall waivers filed in bad
faith or to the disadvantage of the ward.

It was not considered significant that the duties of the conservator
ended with the death of the ward except for the winding up of the
estate. It was observed that the Probate Court's jurisdiction over the
ward's estate continued and that it was bound to see that the estate,
including the forced share derived from the wife, was properly
administered.

§2.5. Probate decree: Petition to vacate. The Probate Court has
extensive powers to vacate decrees upon the grounds of fraud, mistake,
lack of jurisdiction, or for new evidence which first became known

§2.4. 1 G.L., c. 201, §§20, 45.
2 Id. §15.
3 Miller v. Miller, 339 Mass. 262, 158 N.E.2d 674 (1959); Essex Trust Co. v. Averill,
after the decree was entered. In the recent case of Agricultural National Bank of Pittsfield v. Bernard, the Supreme Judicial Court held that a petition to vacate should have been entertained on newly discovered evidence that the will allowed was revoked by a later will duly executed, although there was no proof available as to the contents of the later instrument other than the presence of a clause revoking all prior wills. However, in Boxill v. Maloney, decided during the 1961 Survey year, the Court upset a decree vacating the allowance of a will alleged to have been revoked by marriage subsequent to its execution.

There, the testatrix gave birth to a son while she was unmarried. Subsequently, in 1928, she executed a will leaving all her property "to my husband, Lewis A. Cave" and nominated "my said husband" as executor. She died in 1946, and the son entered an appearance in opposition to the allowance of the will and also filed a petition for administration. After having consulted with counsel and having been paid $1500 from his mother's estate, the son gave written consent to the allowance of the will, and the will was then allowed in 1947.

In 1960 the son brought a petition to vacate the decree allowing the will, contending that the will had been revoked; that, although his mother and Cave lived together as husband and wife from 1911 to 1940, they were not married until 1940 when they had a ceremonial marriage, and this marriage revoked the will. The Court reversed the granting of the petition, observing that there was no fraud, mistake of fact, or any basis in the record for any conclusion that the revocation of the decree was appropriate to afford the petitioner an opportunity to present a meritorious case which in 1947 he had no opportunity to present. Nor was it thought necessary to decide whether the testatrix and Cave were married at the time of execution of the will or whether the will was in contemplation of marriage. The Court felt that there was a reasonable basis for the 1947 decree and by exercise of due diligence the issues could have been presented at that time.

The case is unlike the Bernard case in that the information as to the facts that might have led to the conclusion that the will was revoked was available and could have been presented at the time of the proceedings that resulted in the decree. In Boxill the issues were compromised by the parties before the entry of the decree of allowance.

§2.6. Widow's allowance: Amount. The very nature of the widow's
allowance leaves a wide field for the exercise of judicial discretion.\textsuperscript{1} The amount of the allowance cannot, however, exceed that which is required to provide for the necessities of the widow until she has an opportunity to adjust to the new situation that has resulted from the death of her husband.\textsuperscript{2} It has been emphasized that the award is designed to provide for temporary relief only.\textsuperscript{3} 

\textit{Townsend v. Wood} \textsuperscript{4} held that a $15,000 widow's allowance was an award either for necessaries for more than a short time or for more than necessaries and hence excessive. The estate consisted of $250,000 in personalty and $28,500 in realty. During his lifetime the deceased had been living on approximately $1500 a month including the employment of a maid and a gardening service. The widow was seventy years of age with a meager income.

If the award were upheld, the surviving spouse would have received approximately 6 percent of the inventoried estate free of any income tax.\textsuperscript{5} Such an amount would have been above that required for actual necessities for a temporary period.

\textbf{§2.7. Widow's allowance: Estate tax marital deduction.} During the 1961 \textit{Survey} year the Tax Court of the United States decided in \textit{Rudnick v. Commissioner of Internal Revenue} \textsuperscript{1} that the Massachusetts widow's allowance qualified for the federal estate tax marital deduction. A Massachusetts resident died intestate survived by a widow and two minor daughters. The Probate Court allowed the widow a lump sum of $10,000 "as necessaries for herself and family under her care, in addition to the provisions and other articles by law belonging to her." This sum was paid and none of it was ever returned despite the remarriage of the widow. The award was shown in all of the intestate's estate accountings which were approved by the Probate Court.

The $10,000 was claimed as part of the marital deduction\textsuperscript{2} in the estate tax return. The Commissioner of Internal Revenue disallowed $6666.66 \textsuperscript{3} of the deduction on the ground that the award was a termi-
nable interest under Massachusetts law: that the widow's allowance would terminate upon her death and, since the award had been granted to her and the minor daughters in a lump sum, the amount attributable to her alone was not ascertainable and would be payable to the daughters upon her death.

The Tax Court disagreed with the Commissioner, found that the $10,000 award was not a terminable interest, and allowed that entire amount in computation of the marital deduction. It observed that the widow's allowance took precedence over debts and expenses; that the award might be proper even though the estate were solvent; that once the allowance is granted, it is not subject to collateral attack but can be set aside only on direct appeal; and that the Probate Court itself could not reduce an allowance in a later state of the probate proceedings if the award were not appealed. The court also stated that there was nothing in the Massachusetts statutes that would lead to the conclusion that a widow's award once decreed would pass to anyone else in the event of her death or remarriage.

Although a widow's allowance will fail if she dies before a decree awarding it to her becomes final, it does not become a terminable interest under the Internal Revenue Code. The award in Rudnick was final and approved by the Probate Court in the administratrix' accounts even though it was apparent on the face of these accounts that the widow had remarried.

4 26 U.S.C. §2056(b) (1958) provides: "Limitation in the Case of Life Estate or Other Terminable Interest. —

"(1) General Rule. — Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest —

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ."


8 Pettee v. Wilmarth, 87 Mass. 144 (1862).

9 General Laws, c. 196, §2, provides: "Such parts of the personal property of a deceased person as the probate court, having regard to all the circumstances of the case, may allow as necessaries to his widow for herself and for his family under her care, or if there is no widow or if the deceased was a woman, to the minor children of the deceased, not exceeding one hundred dollars to any child, and also such provisions and other articles as are necessary for the reasonable sustenance of his family, if the deceased was a man, or of her minor children, if the deceased was a woman, and the use of the house of the deceased and of the furniture therein for six months next succeeding his or her death, shall not be taken as assets for the payment of debts, legacies or charges of administration. . . ."


fell short of giving sufficient assistance to ascertain the testatrix' interest, the Court felt compelled to rely on rules of construction. Despite the fact that the trust was to be administered in Massachusetts by a local trustee, Maryland law was applied because the case was concerned with the meaning of dispositive provisions of a testamentary trust of a Maryland domiciliary and not with matters relating to its administration. Accordingly, the Supreme Judicial Court, relying on a Maryland canon of construction, found for those persons who answered the description of "heirs at law" of the testatrix at the death of the last surviving daughter.

There was also an observation that if Massachusetts law controlled then "heirs at law" would mean heirs determined at the death of the testatrix. The remainder over to the heirs of the testatrix would be treated as though it expressed the desire that the statute of descent and distribution was to determine the takers if all the earlier dispositions should fail.

The date of ascertainment of a testator's heirs was also in issue in the case of Dodson v. Winn. The decedent's will left real estate in trust for the benefit of his son, who was also the testator's sole heir at law. The trustee was given the power "to mortgage, lease and convey the same to any person or persons when requested in writing by, or by the will of [the son], and to distribute the net proceeds thereof, if any, to [the son] as he shall direct." There was no residuary clause. The son died intestate, without issue and without having exercised his power of appointment.

The Supreme Judicial Court held that the testator died intestate as to the reversion of the real estate. Since the son was the only heir, he held the reversion subject to defeasance by exercise of the power of appointment. When the son died, the reversion descended to his wife as his statutory heir, but whether she took all or only one half of the real estate would depend on the net worth of his estate.

It appeared, therefore, that the son had the full beneficial title to the real estate at the date of testator's death, and the power to dispose of the property during life and by will was redundant. If the testator's will gave property to his son for life together with a general power to appoint the remainder followed by an express gift over to the testator's

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3 "Where there is an ultimate limitation upon a contingency to a class of persons plainly described, and there are persons answering the description in esse when the contingency happens, they alone can take." Demill v. Reid, 71 Md. 175, 191, 17 Atl. 1014, 1016 (1889).


7 See G.L., c. 190, §2, as amended by Acts of 1956, c. 316, §2.
The Commissioner contended that since the amount paid to the decedent's widow was also for the benefit of the minor children, the interest of the widow was not allocated and therefore unascertainable, thereby making the allowance a terminable interest. This contention was rejected on the ground that neither the Massachusetts statute nor the court decree gave the minor children any rights in the award either during the widow's lifetime or after her death. The court pointed out that a minor's right to support by his mother after his father's death is a right granted by law and is not an interest passing to him from his father's estate.

§2.8. Heirs at law: When ascertained. In Second Bank-State Street Trust Co. v. Weston a testatrix died domiciled in Maryland. Her will left the residue of her estate to a Massachusetts trustee to pay the income to her daughters, as long as they lived, in equal shares. If any daughter died leaving issue, then such issue were to take the daughter's share. In the event of a daughter's death without issue, the share of the income of the deceased daughter was to be divided among her surviving sisters. Upon the death of the last surviving daughter, the principal was to be divided among their issue per stirpes. If all of the daughters died leaving no issue surviving them, the trust fund less certain pecuniary gifts "shall go to my heirs at law." She also authorized the trustee to advance to a child or grandchild of the testatrix a portion of the principal, "but no advancement . . . shall exceed one half of the value of the then expectant or presumptive or vested share of such child or grandchild."

When all the daughters died leaving no issue, a successor trustee sought instructions as to the meaning of "heirs at law" — whether the heirs were to be determined at the death of testatrix, i.e., her daughters, or whether the heirs were to be ascertained at the date of death of her last surviving daughter, i.e., certain descendants of the parents of the testatrix.

The Supreme Judicial Court could find no indication of the meaning of heirs at law without relying upon a rule of construction. One of the contentions favoring the claim that the daughters took as "heirs at law" was that the provision for advancements up to one half of the expectant or presumptive or vested share would have little meaning unless the daughter as an "heir at law" could take a share of the principal by way of a remainder. The Court, however, felt that the provision was of slight assistance. It could be interpreted as permitting an advance to a daughter up to one half of the share of the corpus from which she may have been receiving the income. It could mean that a daughter was to take one half of the principal as an heir at law by way of a contingent remainder. Or, the Court thought it plausible that the use of the words "expectant or presumptive" in the provision had to do with the possibility that a daughter of the testatrix might die leaving issue surviving her before the death of the last surviving daughter.

Since the language of the will and all the surrounding circumstances

heirs, the heirs should be determined as of the date of the son's death if the son were testator's sole heir. There would be an apparent incongruity if the son were to have more than a life estate. Furthermore, it would make the power to appoint redundant if the son had both the life estate and the vested remainder in fee simple, the power to dispose of the property being an incident to ownership of a vested remainder.

In the Dodson case, however, the will did not expressly limit the remainder over to anyone. Thus the remainder had to pass as intestate property to the testator's son as his only heir under the statute of descent.

§2.9. Resulting trust: Husband and wife: Tenancy by the entirety. When a person pays the purchase price for real property and takes title in the name of another, in the absence of an indication of an intent to the contrary, a purchase money resulting trust arises in favor of the one who furnishes the consideration. But, if the transferee is the wife of the one paying the purchase price, a presumption of gift arises and no resulting trust comes into existence unless the presumption is rebutted.

In Goldman v. Finkel the Supreme Judicial Court reversed a Probate Court's decree that a husband was the sole owner of property in the names of husband and wife as tenants by the entirety. The lower

8 See 3 Restatement of Property §308, Comment k, which provides: "If a person to whom a prior interest in the subject matter of the conveyance has been given is the sole heir of the designated ancestor at the death of such ancestor, there is some incongruity in also giving such person all the interest under the limitation to 'heirs' or 'next of kin.' The incongruity is especially great when a will conveys property 'to B and his heirs but if B dies without issue to my heirs' and B is the sole heir of A. The incongruity is almost as great when A, by will, conveys property 'to B for life then to my heirs' and B is the sole heir of A. Thus, the fact that in such cases, B is the sole heir of A at the death of A tends to establish that A intended his heirs to be ascertained as of the death of B, so that B is prevented from sharing in the limitation to the heirs of A." See also 2 Simes and Smith, Future Interests §735 (2d ed. 1956); Annotation, 30 A.L.R.2d 393 (1958). But see Gilman v. Congregational Home Missionary Society, 276 Mass. 580, 177 N.E. 621 (1931).

9 See Warren v. Sears, 308 Mass. 578, 22 N.E.2d 406 (1939); but compare Gilman v. Congregational Home Missionary Society, 276 Mass. 580, 177 N.E. 621 (1931), where testator's daughter was his sole heir and his will left the residue to his daughter "for and during the term of her natural life only" to apply the income for her support and maintenance with "full power and authority [in her] to apply the whole or any part of the principal for the same purposes . . . " On her death the residue was to go to her issue then living, and if she died leaving no issue then to her present husband for life and at his death or at the death of the daughter, if she survived her husband and died without issue, "then in such case . . . the residue is to go to my heirs at law." The Court held that the daughter took under the designation of "heirs-at-law." If followed the ordinary rule that "[a] testator usually resorts to the word 'heirs' to express the objects of his bounty after having exhausted his specific wishes and is content otherwise to let the law take its course." 276 Mass. at 583, 177 N.E. at 622.

3 The parties were divorced at the time the action commenced, and the wife claimed a one-half undivided interest as a tenant in common. See Bernatavicius v. Bernatavicius, 259 Mass. 486, 156 N.E. 685 (1927).
court concluded that there was a resulting trust after having found that the purchase money was furnished entirely by the husband; that title was taken in the form of a tenancy by the entirety "for the sole purpose of providing that in the event of death of the [husband] the said real estate become the property of the [wife] without the necessity of probating the estate of the [husband] and for the purpose of avoiding delay and expenses"; and that since purchase the husband had made all payments due in connection with the property including payments of principal and interest on first and second mortgages.

There was nothing in the findings of the probate judge that would rebut the presumption that a gift was intended. The husband intended the very consequences that attach to a tenancy by the entirety — the passing of the property to the wife by survivorship without the necessity of probate. The observation was also made that in all likelihood the wife obligated herself to repay the mortgage loan to the same extent as the husband. If this were so, the husband did not furnish all of the purchase money, since payments subsequent to taking title cannot create a resulting trust.4

§2.10. Trusts: Trust company's qualification to act. New England Merchants National Bank of Boston v. Centenary Methodist Church1 decided that a Massachusetts trust company, duly appointed as a testamentary trustee, which later converts into a national bank and consolidates, may continue to act as trustee. The trustee's corporate existence continues in the consolidated bank.

Earlier cases requiring a more restrictive view of the continued identity of corporate fiduciaries were rejected. In the first of these, Commonwealth-Atlantic National Bank of Boston, Petitioner,2 a Massachusetts trust company had been nominated executor in a will. The trust company converted into a national bank and then consolidated with another national bank before the will was offered for probate. It was held that the new bank was not entitled to appointment as personal representative of the testator. Although the new bank succeeded to the old one and continued its business activities, it was not the same fiduciary named in the will. It was emphasized that the petitioning bank was organized under the laws of a different jurisdiction from that of the nominated trustee, that it was controlled by different laws, and that it owed allegiance to a different sovereignty.

The second case was Atlantic National Bank of Boston, Petitioner,3 where a trust company had been appointed conservator and trustee under a will. It later converted into a national bank and consolidated with another national bank. The Court held that the new bank was not entitled to account as a duly appointed fiduciary, but could account only de son tort. The Probate Court did not make a new appointment of the consolidated bank.

§2.10 TRUSTS AND ESTATES

Worcester County National Bank, Petitioner,\textsuperscript{4} held that a national bank, which had been duly appointed administrator and had later consolidated with a Massachusetts trust company under the national bank's charter, could continue to act as administrator under its new name. Unlike Commonwealth-Atlantic National Bank of Boston and Atlantic National Bank of Boston, there was no conversion of the corporate fiduciary into a national bank. However, in Worcester County National Bank, Petitioner,\textsuperscript{5} having to do with the same consolidation, it was decided that the consolidated bank was not entitled to account as executor when the trust company had been previously appointed as such by the Probate Court. It was pointed out that an appointment as a fiduciary creates a highly personal relationship and is not a property right involving a pecuniary interest on the part of the fiduciary. Referring to the federal statute authorizing consolidation and providing for its effect,\textsuperscript{6} the Court stated:

To treat the national banking association into which the State trust company has been consolidated as preserving the identity of the trust company in this particular would be contrary to the juridical conception and practice touching the appointment of such fiduciaries under the law of this Commonwealth.\textsuperscript{7}

The New England Merchants National Bank of Boston case expressly declared that the restrictions on continuing identity contained in the aforementioned cases were no longer applicable. The Court said:

Whatever formerly may have been substantial grounds of distinction between national banks and State banks no longer can be said to obtain. One surely could not successfully contend that Federal bank regulation is less secure than State bank regulation. . . . A requirement of new judicial appointments would impose upon estates an expense incommensurate with any supposed advantage. In cases of a trustee under a written instrument such a requirement perhaps could necessitate a submission of the trust to a court for the first time. . . . While cases may be imagined where the successor bank might not be a suitable fiduciary, ade-

\textsuperscript{4} 263 Mass. 394, 161 N.E. 797 (1928).
\textsuperscript{6} It is provided by 44 Stat. 1226, §3, added by c. 191, approved February 25, 1927, in part, that "all the rights, franchises and interests of said State or District bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises and interests, including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District Bank so consolidated with such national banking association."
\textsuperscript{7} 263 Mass. 444, 453-454, 162 N.E. 217, 222 (1928).
quate protection exists in the power of removal. . . . In general, one would not expect that a judicial determination as to the fitness of a national bank made as an incident to the approval of an appointment by a court be even remotely comparable with the thoroughness and efficiency of consecutive Federal administrative supervision. 8

Massachusetts law on this point now corresponds to the prevailing view, although, unlike most states, the result evolved through case law rather than legislation. 9

§2.11. New legislation. Chapter 253 of the Acts of 1961 makes clarifying changes in the simultaneous death law1 by specifically providing that:

[i]f property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person and both persons die, and there is no sufficient evidence that the two have died other than simultaneously, the beneficiary shall be deemed not to have survived.

It also exempts from the application of the simultaneous death statute any situation in which provision has been made for a different distribution of property or for a different presumption of survivorship. Acts of 1961, c. 254, amends G.L., c. 206, §24, by adding:

In cases where the Veterans Administration is entitled to notice and the accountant certifies that the value of the estate does not exceed five thousand dollars, the Veterans Administration shall be deemed a competent disinterested party to represent persons unborn, unascertained or legally incompetent to act in their own behalf.

Chapter 271 of the Acts of 1961 permits a federal savings and loan association or a national banking association having a savings account in trust for another to make payments to the trustee or the other person if no other notice of the existence and terms of the trust has been received in writing. This corresponds to a similar provision concerning Massachusetts savings banks in G.L., c. 168, §21.

Acts of 1961, c. 448, deletes the last two sentences of G.L., c. 184A, §3,2 so as to limit the duration of a possibility of reverter, a right of

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9 See 1 Scott, Trusts §96.7 (2d ed. 1956).

§2.11. 1 G.L., c. 190A.
2 General Laws, c. 184A, §3, as added by Acts of 1954, c. 641, §1, provided: "A fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty years from the date when such fee simple determinable or such fee simple subject to a right of entry becomes possessory. If such contingency occurs within said thirty years the succeeding interest, which may be an interest in a person other than the person creating the interest or his heirs, shall become possessory or the right of entry exercisable notwithstanding the rule against
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entry, and an executory interest to a period of thirty years when such interests arise out of a transfer of land which created a fee simple determinable or a fee simple subject to a condition subsequent. It no longer makes a difference that the specified contingency may or may not occur within the period of the rule against perpetuities. The exceptions involving transfers for charitable purposes and transfers by the Commonwealth are also deleted.

perpetuities. But if a fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken is so limited that the specified contingency must occur, if at all, within the period of the rule against perpetuities said interests shall take effect as limited. This section shall not apply where both such fee simple determinable and such succeeding interest, or both such fee simple and such right of entry are for public, charitable, or religious purposes; nor shall it apply to a deed, gift or grant of the commonwealth or any political subdivision thereof."